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No. 299

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

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KENTUCKY RIVER MILLS - - - Petitioner

vs.

G. HARRY JACKSON - - - - - Respondent

Petition For A Writ Of Certiorari To The United States Court of Appeals For The Sixth Circuit

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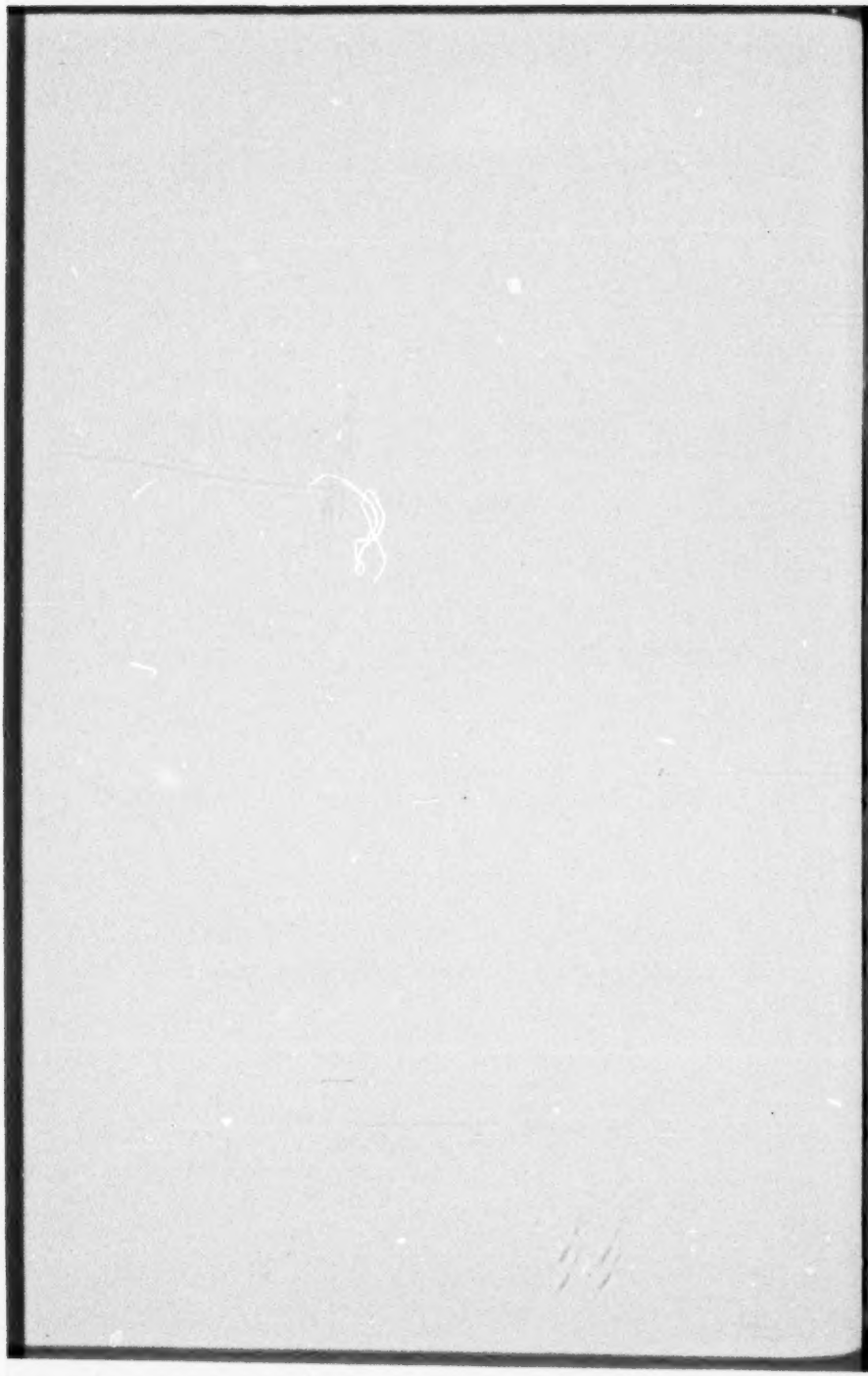

INDEX

	Page
Opinion Below	1
Jurisdiction	1
Questions Presented	2
Statutes Involved	2
Specification of Errors	2
Statement	3
Reasons for Granting the Writ	5

Citations

Cases:

Atlantic Coast Line R. R. Co. v. Burnett, 239 US 199, 60 L ed. 226	20
Barnett v. National Bank, 98 US 555	19
Bullard v. Morgan H. Grace Co., Inc., 230 NY 388, 148 NE 559	10
Capital Traction Co. v. Hof, 174 US 1, 43 L ed. 893, 19 S Ct 580	14
Currin v. Wallace, 306 US 1, 83 L ed. 441, 59 S Ct 379	14
Engle v. Davenport, 271 US 33, 70 L ed. 813	20
Evans v. Hudson Coal Co., 165 F. (2d) 970	18
Gatliff Coal Co. v. Cox, 142 F. (2d) 876	13
Gibbs v. Zimmerman, 290 US 326, 78 L ed. 342, 54 S Ct 140	14
Grimes v. Sanders, 93 US 55, 23 L ed. 798	15
In Re The Hartbridge, 57 F. (2d) 672	10

AUG 9 1955

217248

Page

Jackson v. Kentucky River Mills, 61 F. Supp. 601 5

Jackson v. Kentucky River Mills, 170 F. (2d) 5

Jones v. Jones, 229 Ky. 71,-16 SW (2d) 502.. 13

Karpenin v. Karl Kiefer Mach. Co., 187 F. (2d) 32 18

Lean v. Clapp, 141 US 429, 35 L ed. 804, 12 S Ct 29..... 15

Marine Transit Corp. v. Dreyfus, 284 US 263, 75 L ed. 282..... 18

Pollard v. Bailey, 87 US 520..... 19

Porter, Price Administrator v. Warren Holding Co., 328 US 395, 90 L ed. 1002..... 19

Pneucrete Corp. v. United States Fidelity and Guaranty Co., 46 Pac. (2d) 1000..... 12

Prigg v. Pennsylvania, 16 Pet. 534, 10 L ed. 1060 19

Red Cross Line v. Atlantic Fruit Co., 264 US 109, 68 L ed. 582, 44 S Ct 274..... 7

Ross v. Jones, 89 US 576..... 19

Switchmen's Union of North America v. National Mediation Board, 320 US 297, 88 L ed. 61 19

United States v. McCord, 233 US 157, 58 L ed. 893 20

Statutes:

9 USCA 1, Act February 12, 1925, 43 Stat. 883, as Amended Act of July 30, 1947, 61 Stat. 669 7

New York Laws, Chapter 275, Laws 1920.... 10

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. ——

KENTUCKY RIVER MILLS, - - - - - *Petitioner,*

vs.

G. HARRY JACKSON, - - - - - - *Respondent.*

Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

Petitioner, Kentucky River Mills, a corporation, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered in the above entitled case on the 17th day of June, 1953.

OPINION BELOW

The opinion of the United States Court of Appeals, Sixth Circuit, (R. 213) is reported in 205 Fed. (2d) ——. No opinion was delivered by the District Court.

JURISDICTION

The judgment of the United States Court of Appeals, Sixth Circuit, was entered on June 17, 1953 (R. 212). The jurisdiction of this Court is invoked under 28 U.S.C. 1253(1).

QUESTIONS PRESENTED

1. Whether, consistent with Section 4 of the Federal Arbitration Act, a party to a contract involving interstate commerce and providing for arbitration of any dispute arising under it, may, upon the refusal of the other party to arbitrate on the ground that the contract is invalid, proceed with an ex parte arbitration before its nominee acting alone, where the arbitration clause provides that each party may name an arbitrator, but if either party fails to do so within a specified time after receiving the other party's nomination, the one arbitrator so nominated may act as sole arbitrator, rather than invoke the remedy provided by Section 4 of said Act, and the resultant award thereafter be enforced.

2. Whether the one year limitation contained in Section 9 of the Federal Arbitration Act precludes the enforcement of an award, rendered under an arbitration provision contained in a contract involving interstate commerce in which the parties had agreed that a judgment might be entered on the award, in an action instituted thereon more than one year after its rendition.

STATUTES INVOLVED

The pertinent statutory provisions are printed in Appendix, infra, p. 21.

SPECIFICATION OF ERRORS

The United States Court of Appeals, Sixth Circuit, erred:

1. In holding that the award sued on was valid and enforceable.

2. In holding that the enforcement of the award sued on, which was rendered on January 10, 1945, in this action, which was filed on February 16, 1949, was not barred by the one year limitation contained in Section 9 of the Federal Arbitration Act.

3. In affirming the judgment of the District Court.

STATEMENT

This is a diversity suit based upon an alleged arbitration award. The contract upon which the action is based concerned interstate commerce, and the Federal Arbitration Act is therefore involved.

The contract provided that any dispute arising under it should be settled by arbitration "in New York in the customary manner . . . . " Provision was made for the selection of arbitrators by each party. It was further provided that if either party failed to name an arbitrator, the other arbitrator might act alone.[1]

A dispute arose in 1944 with respect to the shipment of certain fiber by respondent's assignor, Smith & Bird, to petitioner (R. 177). Respondent's assignor notified petitioner of the dispute, demanded arbitration, and appointed an arbitrator (R. 4). Petitioner, believing that the entire contract had been procured by fraud on the part of Smith & Bird, refused to arbitrate (R. 27). Nevertheless, Smith & Bird conducted an

[1] "23. Arbitration: Any dispute arising out of this contract or its interpretation shall be settled by arbitration in New York in the customary manner, buyer and seller each naming his arbitrator, whose award, or that of the umpire whom the arbitrators may appoint, shall be final and binding upon both parties. If either party fails to appoint an arbitrator within seven (7) days after receiving the other party's nomination of an arbitrator, the one arbitrator may act as sole arbitrator. In case of alleged inferiority, the arbitrators' and umpire's fees are to be paid by the seller if the fibre is allowanced more than the amount which the seller may have offered the buyer in settlement; otherwise the fees are to be paid by the buyer. The seller and buyer consent that the arbitration shall be enforceable under and pursuant to the laws of the State, Country or Government having jurisdiction and that judgment upon the award may be entered in any court of any such jurisdiction."

arbitration in New York, before its own nominee—a proceeding in which petitioner did not appear. On January 10, 1945, Smith & Bird's nominee rendered an award, which is the basis of the present action (R. 11).[2]

Meanwhile, petitioner had asserted a claim against Smith & Bird for damages resulting from the shipment of defective fibers, which had been previously delivered under the contract (R. 27).

For the obvious purpose of insulating itself from liability on a counter-claim, Smith & Bird purported to assign the award of January 10, 1945, to respondent (R. 14). While this assignment purports to vest respondent with title to the award, the actual agreement entered into by Smith & Bird was completely different. There was a secret, unwritten understanding—uncontradicted, and even admitted — that Smith & Bird should select respondent's counsel, pay the counsel fees and all expenses incurred in litigation, and receive the proceeds from any recovery upon the award (R. 64). Respondent's sole function was to lend his name to

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[2] The Supreme Court of New York County, New York, on January 31, 1945, upon motion of Smith & Bird, confirmed the award of January 10, 1945, and rendered judgment thereon (R. 42). Petitioner did not appear in such proceeding.

On April 12, 1945, Smith & Bird assigned such judgment to respondent, and he instituted an action against petitioner in the District Court for the Eastern District of Kentucky on such Judgment. The District Court dismissed the action, holding that the judgment was void (Jackson v. Kentucky River Mills, 61 Fed. Supp. 601).

After the dismissal of the action on the judgment, the Supreme Court of New York County, upon motion of respondent, undertook to vacate the judgment on the award and remit the matter to the arbitrator for the making of a new award (R. 4). The arbitrator on November 12, 1946, rendered a new or second award in favor of respondent (R. 44). A motion to confirm such second award under Section 9 of the Federal Arbitration Act, made in the District Court for the Southern District of New York, was denied (R. 40).

Respondent then instituted a third arbitration proceeding before the same arbitrator, and a third award was rendered on December 30, 1947 (R. 53). A motion to confirm such third award, under Section 9 of the Federal Arbitration Act, made in the District Court for the Southern District of New York, was denied on March 31, 1948 (R. 50). The order of the District Court was affirmed by the Court of Appeals, Second Circuit (Jackson v. Kentucky River Mills, 170 Fed. (2d) 32).

Smith & Bird; or, as respondent himself put it, "meeting the request of a valued friend and client" (R. 61).

This action was filed on February 16, 1949, in the District Court for the Eastern District of Kentucky. Petitioner set up four principal defenses, only two of which are directly involved in this petition: (1) that the contract itself was unenforceable, because procured through fraud by Smith & Bird and mistake by petitioner; (2) that Smith & Bird's sole remedy for petitioner's refusal to participate in an arbitration was the remedy provided by Section 4 of the Federal Arbitration Act, and that the ex parte award of January 10, 1945, was therefore unenforceable in this action; (3) that the limitation of one year contained in Section 9 of the Federal Arbitration Act barred enforcement of the award, even if it were valid; and (4) that respondent, not being the real party in interest, had no standing to maintain this action or to recover on the award (R. 17, 69).

The District Court struck all of petitioner's defenses, except for the allegation of fraud in the procurement of the original contract (R. 68). Upon the trial of that issue, the District Court directed a verdict for respondent, and thereupon entered a judgment in respondent's favor (R. 112). The judgment of the District Court was affirmed by the Court of Appeals (R. 226).

REASONS FOR GRANTING THE WRIT

The case presents two important federal questions, none of which have been decided by this court.

1. The first question presented—whether a party, upon the refusal of the other party to arbitrate on the ground that the contract is invalid and unenforceable, may proceed with an arbitration in the manner provided in the contract and secure judicial enforcement

of the award thereby obtained, rather than invoke the remedy provided in Section 4 of the Act—is one of importance in the application of the Federal Arbitration Act.

So far as this court is concerned, and so far as the federal judicial system as a whole is concerned, this question is wholly novel. It involves the relationship between Section 2 of the Act, which declares arbitration agreements to be valid and enforceable, and Section 4 of the Act, which provides a means for enforcing an agreement to arbitrate in the event of refusal by one of the parties. No decision of this court, nor the decision of any federal court, prior to the instant one, has dealt with this issue. Until the point now in question has been finally settled by this court, available guide posts, both for litigants and parties to arbitration agreements, will be wholly lacking. Under these circumstances it seems that regardless of the eventual outcome of the case, the writ clearly should be granted.

Petitioner now contends, and throughout this litigation has contended that the award sued on is invalid and unenforceable, for the reason that performance of the arbitration clause in the contract, upon petitioner's refusal to enter into an arbitration proceeding, could be enforced only in the manner provided by Section 4 of the Federal Arbitration Act.

The Court of Appeals rejects such construction, and in sustaining the award, holds that the remedy provided by Section 4 of the Act is merely cumulative, and that Smith & Bird, upon petitioner's refusal to name an arbitrator, was not required to invoke the remedy provided in Section 4 of the Act but could proceed with the *ex parte* arbitration before its own nominee as arbitrator. Such construction does violence to the clear purpose and intent of the Act; and moreover, gives rise to a serious question as to the constitutionality of certain parts of the Act.

In the enactment of the Federal Arbitration Act,[3] Congress overturned the long existing rule that the performance of such agreements could not be compelled by resort to the courts.[4] The Committee on the Judiciary of the House of Representatives, in its report upon the bill, said: " .... The bill declares simply that such agreements for arbitration shall be enforced, *and provides a procedure in the Federal courts for their enforcement* ...."[5] In Section 2 of the Act it is provided that "a written provision in any .... contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof ...., shall be valid, irrevocable, and enforceable, *save upon such grounds as exist at law or in equity for the revocation of any contract.*"

Thus, under the express terms of the Act, an arbitration clause contained in a contract which is invalid upon any ground existing at law or equity for the revocation of a contract is not made enforceable. While Sections 10 and 11 of the Act provide the grounds upon which an award may be vacated, modified or corrected, neither of such sections include the invalidity of the contract as a ground for the vacation of an award. The only provision for the determination of the validity of the contract is found in Sections 3 and 4 of the Act. Section 3 provides, in part, that "If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, *upon being satisfied that the issue involved in such suit or proceeding is referable to*

[3] 9 USCA 1, et seq.; Act of Feb. 12, 1925; 43 Stat. 883; Act of July 30, 1947, c. 392, 61 Stat. 669.

[4] Red Cross Line v. Atlantic Fruit Co., 264 U.S. 109, 68 L. ed. 582, 44 S. Ct. 274.

[5] House Rep., No. 96, 68th Cong., 1st Sess.

arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement . . . . " Section 4 provides, in part, that "A party aggrieved by the alleged failure, neglect, or *refusal of another* to arbitrate under a written agreement for arbitration, may petition any court of the United States which, save for such agreement, would have jurisdiction . . . . for an order directing that such arbitration proceed in the manner provided for in such agreement . . . . The court shall hear the parties, *and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue,* the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement . . . . If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof . . . . Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand the court shall make an order referring the issue or issues to a jury . . . . If the jury find that no agreement in writing for arbitration was made or there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof."

The Act sets up no specific procedure whereby a party, who asserts the invalidity of the contract, may reserve such question and proceed with an arbitration under the contract, and then later vacate or contest the validity of the award upon the ground that the contract

was invalid. Very much to the contrary, the Act does not, as pointed out, make the invalidity of the contract a ground for vacating the award.

Due process would require that a party to such a contract be afforded an opportunity to contest its validity. It is clear that Congress never intended that a contract which was invalid and unenforceable be enforced, since Section 2 of the Act does not make valid, irrevocable and enforceable a contract which is invalid, revocable or unenforceable "upon such grounds as exist at law or in equity for the revocation of any contract"; and, in Section 4 of the Act, Congress undertook to set up a procedure, which meets the requirements of both due process and trial by jury, which would enable a party to such a contract, who in good faith refused to perform it upon the ground that it was invalid and unenforceable, to contest its validity before an enforcement of it would be required. The Act makes no other provision for the determination of the fundamental questions of agreement and default. The fact that Congress required that the validity of the contract be determined before arbitration and did not include the invalidity of the contract as a ground for the vacation of an award, definitely indicates that it contemplated that any issue as to the validity of the contract would be determined prior to the requirement of arbitration and the rendition of any award. And, too, as further indicative of such intent, it will be observed that if and when an arbitration is ordered under Section 4, it proceeds in accordance with the terms of the contract. If the contract provides a method for the naming of arbitrators, such method must be followed. The refusal of one party to arbitrate does not in any respect change the rights of the parties under the contract, if and when arbitration is ordered. Even if a party, as a consequence of his refusal to arbitrate, has failed to name an arbitrator, if authorized to do by the con-

tract, upon the entry of an order requiring arbitration, the court, under Section 5 of the Act, is authorized, at his request, to name one for him. The reasons why the validity of the contract, where one of the parties is contesting its validity, should be determined prior to the requirement of an arbitration under it are rather obvious, and it is clear that Congress did not intend that one, who in good faith challenges the validity of the contract, should be subjected to an arbitration until and unless the validity of such contract had been determined in a proceeding under Section 4 of the Act.

The Federal Arbitration Act is "almost verbatim like"[6] the New York Arbitration Law.[7] Section 4 of the Federal Arbitration Act and Section 3 of the New York Arbitration Act are almost identical. In *Bullard* v. *Morgan H. Grace Co., Inc.*, 240 N.Y. 388, 148 N.E. 559, the right of one party to proceed with an arbitration after the other party withdrew and enforce the resultant award was involved. The Court of Appeals of New York, in holding the remedy provided by Section 3 of the New York Act was exclusive and vacating the award, said:

> "But neither the agreement to arbitrate nor the submission is self-executory. A party to an arbitration agreement may break his contract. A remedy is provided in case of his default by Arbitration Law, Section 3. A party aggrieved by the failure, neglect, or refusal of another to perform, either under a contract or a submission providing for arbitration, may petition the Supreme Court for an order directing that the arbitration proceed. On such application the other party may put in issue (a) the making of the contract to arbitrate the questions sought to be submitted to arbitra-

[6] In Re The Hartbridge, 57 Fed. (2d) 672.
[7] Chapter 275, New York Laws 1920.

tion, or (b) the submission of such questions to arbitration, or (c) the failure to comply therewith. If the making of the contract or the submission or the default be in issue, the issue thus joined shall be tried. A jury trial may be demanded. It is only when it is found by the court that a written contract of arbitration has been made or a submission has been entered into, covering the question sought to be included in the arbitration, and that a party is in default in the performance thereof, that the court will order the parties to the contract or submission to proceed with the arbitration in accordance with the terms thereof. The question arises in this case whether there was a default in the performance of the arbitration agreement or the submission . . . . "

And the court, after discussing the English case of Bankers' & Shippers' Insurance Co. of New York v. Liverpool Marine & General Insurance Co., N. Y. Law J., March 4, 1925, further said:

"Repudiation by one party of the contract to arbitrate does not, therefore, leave the other party in position to proceed without the sanction of the court. The withdrawing party might still assert that it had made no contract to submit to arbitration the questions contained in the submission; that it was not in default under the contract. Mr. Justice Bailhache, on the trial of the English action, aptly stated the proper rule as follows:

" 'It seems to me the section of the act treats such a party, the party who desires to go to arbitration, as a party aggrieved if the other party fails, neglects, or refuses to perform his obligation under the contract. That seems to me the definition of the party aggrieved, and his grievance is the failure, neglect, or refusal of another to perform under the contract . . . . Prior to the act of 1920 there was no remedy when a person refused to

submit to arbitration. The act of 1920 does provide a remedy, but that remedy is, if the person still desires to go to arbitration, that he shall do so after first obtaining the sanction of the court to that effect.' "

After the decision in the *Bullard* case, the Legislature of New York amended Section 3 of the New York Arbitration Law so as to provide that where an award had been rendered, without previous application to the court, as required by Section 3, such award should notwithstanding anything contained in Section 3 be valid and enforceable. Congress in the re-enactment of the Federal Arbitration Act by Act of July 30, 1947, did not amend or otherwise change the requirements of Section 4 of its Act, notwithstanding the decision in the *Bullard* case, and such section now stands as originally enacted. The failure of Congress under the circumstances to modify the requirements of Section 4 of the Act would indicate an unwillingness to do so.

The Bullard case has been followed in the construction of a similar statute in California.[8]

The Court of Appeals in this case declined to follow the Bullard case, upon the view that "It seems doubtful that the court in the Bullard case intended to include within the scope of its ruling cases where a party to an agreement to arbitrate refused to appear, when duly notified, giving no reason therefor or giving a reason that did not involve the authority of the arbitrators to act." Obviously, such reasoning could have no application to this case, since the refusal of petitioner to arbitrate was predicated expressly upon the invalidity of the contract (R. 27), and any invalidity of the contract would certainly involve the authority of the arbitrators to act.

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[8] Pneucrete Corp. v. United States Fidelity and Guaranty Co., 46 Pac. (2d) 1000.

The Court of Appeals sustains the award upon the basis of the provision of the arbitration clause, wherein the parties agreed that "if either party fails to appoint an arbitrator within seven (7) days after receiving the other party's nomination of an arbitrator, the arbitrator nominated may act as sole arbitrator." The Court of Appeals felt that this provision was valid, and that Smith & Bird, upon the failure of petitioner to nominate an arbitrator, could proceed with an ex parte arbitration before its nominee (R. 226). Whether such a provision in an arbitration agreement be valid or invalid,[9] the parties in such clause did not agree that an arbitration might proceed in the manner specified irrespective of the validity of the contract of which such arbitration clause is a part. The parties did not agree that the validity of the contract should be unchallengable by either party. Nor, did the parties agree that an arbitration might proceed in the manner specified upon the refusal of one of the parties to enter into an arbitration upon the ground that the contract was invalid. Such provision clearly contemplated a valid contract, and, moreover, the authority of any arbitrator to act could only exist on the basis of a valid contract providing for arbitration. *Such construction of the contract constitutes a denial to the parties of the right to a judicial determination of the fundamental quesion of the validity of the contract, and defeats, as well as destroys the very purpose of Section 4 of the Act.* As pointed out, the arbitration clause provides for the entry of a judgment on the award, and the party in whose favor an award was rendered had the right, upon timely application, to obtain a judgment on such award under Section 9 of the Act. It is made the mandatory

[9] The arbitration clause, which provides for the arbitration of "any dispute arising out of this contract" was unenforceable under the law of Kentucky (Jones v. Jones, 229 Ky. 71, 16 S. W. (2d) 502; Gatliff Coal Co. v. Cox, 142 Fed. (2d) 876.) Any validity exists only by reason of Section 2 of the Act (Jackson v. Kentucky River Mills, 65 Fed. Supp. 601).

duty of the court to grant such a judgment, unless the award is vacated as prescribed in Sections 10 and 11 of the Act. Sections 10 and 11 of the Act do not make the invalidity of the contract as a ground for vacating an award. Notwithstanding the assertion of the Court of Appeals to the contrary, it is clear that the invalidity of the award could not be raised as a defense in a proceeding for confirmation of the award under Section 9 of the Act; and as a matter of fact, after the dismissal by the District Court of the action on the judgment obtained in the Supreme Court of New York County, respondent sought to deny to petitioner the right to contest the validity of the contract through the institution of a new arbitration proceedings and the enforcement of the resultant awards in a proceeding under Section 9 of the Act.

Arbitration presupposes the existence of a contract to arbitrate. If a party to such a contract denies the existence of the contract, and with it the jurisdiction of the arbitrators to act, the courts of justice must be open to him for the determination of the issue.[10] So, also, if the issue raised be one which is properly triable before a jury, a question with respect to the right to a trial of such issue by a jury would be involved.[11] Thus, upon the basis of the construction placed upon it by the Court of Appeals, the constitutionality of the Act would be open to grave question, whereas, if the plain language of Section 4 be given effect any question of constitutionality is removed. We must presume that Congress intended the remedy provided in Section 4 of the Act to be constitutionally sufficient, and such

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[10] The power to regulate commerce, like the other great substantive powers of Congress, is subject to the Fifth Amendment (Currin v. Wallace, 306 U.S. 1, 83 L. ed. 441, 59 S. Ct. 379), and it required the preservation of the substantial right of petitioner to challenge the validity of the contract by some effective procedure (Gibbes v. Zimmerman, 290 U.S. 326, 78 L. ed. 342, 54 S. Ct. 140).

[11] Capital Traction Co. v. Hof, 174 U.S. 1, 43 L. ed. 873, 19 S. Ct. 580.

section should be broadly construed to give effect to its remedial purpose.

It is no answer to this contention to say, as the Court of Appeals has said, that petitioner in this case was permitted by the District Court to raise its defense after the ex parte arbitration was concluded. It is, of course, true that this petitioner was permitted to have a trial upon the issue as to the validity of the contract. But, since this trial was had only after an adverse award had been rendered in the ex parte proceeding, the petitioner was compelled to pay a heavy price in order to obtain an adjudication of its defense. Once the ex parte arbitration was concluded, petitioner lost all opportunity to present any claim or defenses which might have been available in the arbitration proceeding itself, as distinct from judicial proceeding for the enforcement of the award.

Petitioner, in other words, was, if the decision of the Court of Appeals should stand, forced to choose between abandoning its claim that the contract was invalid and abandoning any defenses or claims which it might have presented to the arbitrators.

Congress probably could have provided a procedure whereby a party who asserts the invalidity of the contract might, after asserting its invalidity, proceed with an arbitration under it without waiving his right to thereafter challenge its validity, it in the Act makes no provision for such procedure. The general rule is that if a party desires to rely upon the invalidity of a contract, he must disclaim it and refuse to permit anything to be done under it so far as it concerns him.[12] Petitioner's participation in any arbitration, after its assertion of the invalidity of the contract, would have probably estopped it from thereafter relying upon the invalidity of the contract.

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[12] Lean v. Clapp, 141 U.S. 429, 35 L. ed. 804, 12 S. Ct. 29; Grimes v. Sanders, 93 U.S. 55, 23 L. ed. 798.

The Act, as we have pointed out above, contains no provision for challenging the enforcement of an award upon the ground that the contract itself was invalid. Indeed, Section 9 of the Act makes mandatory the judicial enforcement of an award except upon the grounds set forth in Sections 10 and 11. It is therefore perfectly clear that petitioner, had it proceeded to arbitration in accordance with the demand of Smith & Bird, would have lost all opportunity to contest the validity of the contract. It is equally clear that the belated judicial test of the contract's validity, afforded petitioner in this case, operated to prevent petitioner from raising defenses and presenting claims which might have been set forth in the arbitration proceeding if Smith & Bird had utilized the remedy provided by Section 4 of the Act.

That this dilemma is neither fictional, nor an afterthought, is made clear by the fact that petitioner informed Smith & Bird of such claim and defenses on the day following receipt of the demand for arbitration (R. 27). Moreover, the fiber actually shipped was, according to Smith & Bird's own admission, defective (R. 106).

Apparently the Court of Appeals, like the District Court, failed to perceive this dilemma. It is not enough that petitioner be afforded a last-minute opportunity to test the validity of the contract. Petitioner is entitled to avail itself of such an opporunity at the time and in the manner provided by the Congress in Section 4 of the Act.

2. The second question presented—whether an enforcement of the award is barred by the one year limitation contained in Section 9 of the Act—is one of importance in the administration of the Federal Arbitration Act.

Section 9 of the Act provides that "If the parties in their agreement have agreed that a judgment of the

court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in Sections 10 and 11 of this title. If no court is specified in the agreement of the parties, then such application may be made to the United States court in and for the district within which such award was made."

The arbitration clause in the involved contract provided that "the seller and buyer consent that the arbitration shall be enforceable under and pursuant to the laws of the State, Country, or Government having jurisdiction and that judgment upon the award may be entered in any court of any such jurisdiction." (R. 10).

This action was filed on February 16, 1949 (R. 1). The award sued on was rendered January 10, 1945 (R. 11).

Petitioner now contends, and throughout this litigation has contended that the enforcement of the award sued on was barred by the one year limitation contained in Section 9 of the Act.

The Court of Appeals denied such contention, holding that the remedy provided by Section 9 of the Act was merely cumulative. United Fuel Gas Co. v. Columbian Fuel Corp., 165 F. 746 (C. C. A. 4), and Lehigh Structural Steel Co. v. Rust Engineering Co., 59 Fed. (2) 1038 (CADC) are cited. The question under consideration was not presented or considered in either of such cases. The Federal Arbitration Act was not inolved in the United Fuel Gas Co. case. The contract involved in the Lehigh Structural Steel Co. case did not provide for the entry of any judgment on the award.

The Act provides for the enforcement of an award only where the parties have agreed for the entry of a judgment on the award, and is silent as to the enforcement of an award where the parties have not agreed that a judgment may be entered on it. If the court be specified, then the court specified is vested with power to and required, upon the application of either party, to enter an order confirming the award, unless it be vacated, modified or corrected as prescribed in Sections 10 and 11. The enforcement of such an award in such manner is not limited to courts of the United States; but, much to the contrary, the power may be exercised by any court specified in the contract—state or federal. If no court be specified, then upon the application of either party, the power may be exercised by the United States Court in and for the district in which the award is rendered. It is to be further noted that in either event the order confirming the award may be made only if the award is not vacated, modified, or corrected as prescribed in Sections 10 and 11 of this title. Such language obviously authorizes a party in such a proceeding to assert in opposition to a confirmation of the award any of the grounds specified in Sections 10 and 11 of the Act. The courts so hold.[13] Thus, the Act prescribes a definite remedy, which is adequate and complete within itself, with respect to the enforcement of awards where the parties have agreed that a judgment may be rendered on the award.

The fact that this court holds that a court, where its jurisdiction has been invoked under Section 4 to require an arbitration, has the power to enter a judgment on any award rendered in the arbitration required, even though the parties had not agreed that the award might be reduced to judgment (Marine Transit Corp. v. Dreyfus, 284 U.S. 263, 75 L. ed. 282), indicates

[13] Evans v. Hudson Coal Co., 165 Fed. (2d) 970; Karpinen v. Karl Kiefer Machine Co., 187 Fed. (2d) 32.

the view that Congress in the enactment of the Act undertook to deal with the whole field of the enforcement of awards arising out of contracts involving interstate commerce (Prigg v. Pennsylvania, 16 Pet. 534, 10 L. ed. 1060). Whether so or not, Congress in the Act has specifically dealt with the subject to the extent of providing a definite remedy for the enforcement of awards where the parties had agreed that any award might be reduced to judgment, and it may be said, as it was said in Switchmen's Union of North America, et al., v. National Mediation Board, et al., 320 U.S. 297, 88 L. ed. 61, that:

> "Congress for reasons of its own decided upon the method for the protection of the 'right' which it created. It selected the precise machinery and fashioned the tool which it deemed suited to that end. * * * All constitutional questions aside it is for Congress to determine how the rights which it creates shall be enforced. Tutum v. United States, 270 U. S. 568, 576-577. In such a case the specification of one remedy normally excludes another."

It is familiar law, even in cases where the statute did not involve an exercise of an exclusive power resting in Congress, that where a right of action is created which did not exist at common law, and the statute creating the right provides a special manner in which the right so created may be enforced, the remedy provided is exclusive.[14]

It is also familiar law that where by statute a right of action is given which did not exist by the common law, and the statute giving the right fixes the time within which the right may be enforced, the time so fixed becomes a limitation or condition on such right

[14] Ross v. Jones, 89 U.S. 576; Pollard v. Bailey, 87 U.S. 520; Barnett v. National Bank, 98 U.S. 555; Porter Price Administration v. Warren Holding Co., 328 U.S. 395, 90 L. ed. 1002.

and will control the exercise of such right, no matter in which forum the action is brought.[15]

The fact that Congress in the Act, in dealing with the subject, singles out and provides a specific remedy for the enforcement of an award and a specific time within which such remedy may be exercised where the parties have agreed that a judgment might be entered on the award, whereas it is silent with respect to the enforcement of an award where the parties have not agreed that a judgment may be entered upon the award, must be construed as evidencing an intent on the part of Congress that the remedy provided be exclusive.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

LESLIE W. MORRIS
MARION RIDER
Counsel for Petitioner

August 28, 1953

[15] United States, ex rel. v. McCord, 233 U.S. 157, 58 L. ed. 893; Engle v. Davenport, et al., 271 U.S. 33, 70 L. ed. 813; Atlantic Coast Line R. R. Co. v. Burnette, 239 U.S. 199, 60 L. ed. 226.

APPENDIX

UNITED STATES ARBITRATION ACT—9 USCA 1, ET SEQ.

§ 1. "Maritime transactions" and "commerce" defined; exceptions to operation of title

"Maritime transactions," as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; "commerce," as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce. July 30, 1947, c. 392, § 1, 61 Stat. 669.

§ 2. Validity, irrevocability, and enforcement of agreements to arbitrate

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract. July 30, 1947, c. 392, § 1, 61 Stat. 669.

§ 3. Stay of proceedings where issue therein referable to arbitration

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration. July 30, 1947, c. 392, § 1, 61 Stat. 669.

§ 4. Failure to arbitrate under agreement; petition to United States court having jurisdiction for order to compel arbitration; notice and service thereof; hearing and determination

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any court of the United States which, save for such agreement, would have jurisdiction under the judicial code at law, in equity, or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by law for the service of summons in the jurisdiction in which the proceeding is brought. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings,

under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by law for referring to a jury issues in an equity action, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof. July 30, 1947, c. 392, § 1, 61 Stat. 669.

§ 5. Appointment of arbitrators or umpire

If in the agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed; but if no method be provided therein, or if a method be provided and any party thereto shall fail to avail himself of such method, or if for any other reason there shall be a lapse in the naming of an arbitrator or arbitrators or umpire, or in filling a vacancy, then upon the application of either party to the controversy the court shall designate and appoint an arrbitrator or arbitrators or umpire, as the case may require, who shall act under the said agreement with the same force

and effect as if he or they had been specifically named therein; and unless otherwise provided in the agreement the arbitration shall be by a single arbitrator. July 30, 1947, c. 392, § 1, 61 Stat. 669.

§ 6. Application heard as motion

Any application to the court hereunder shall be made and heard in the manner provided by law for the making and hearing of motions, except as otherwise herein expressly provided. July 30, 1947, c. 392, § 1, 61 Stat. 669.

§ 7. Witnesses before arbitrators; fees; compelling attendance

The arbitrators selected either as prescribed in this title or otherwise, or a majority of them, may summon in writing any person to attend before them or any of them as a witness and in a proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case. The fees for such attendance shall be the same as the fees of witnesses before masters of the United States courts. Said summons shall issue in the name of the arbitrator or arbitrators, or a majority of them, and shall be signed by the arbitrators, or a majority of them, and shall be directed to the said person and shall be served in the same manner as subpoenas to appear and testify before the court; if any person or persons so summoned to testify shall refuse or neglect to obey said summons, upon petition the United States district court for the district in which such arbitrators, or a majority of them, are sitting, may compel the attendance of such person or persons before said arbitrator or arbitrators, or punish said person or persons for contempt in the same manner provided by law for securing the attendance of witnesses or their punishment for neglect or refusal to attend in the courts of the United States. July 30, 1947, c. 392, § 1, 61 Stat. as amended Oct. 31, 1951, c. 655, § 14, 65 Stat. 715.

§ 8. Proceedings begun by libel in admiralty and seizure of vessel or property

If the basis of jurisdiction be a cause of action otherwise justiciable in admiralty, then, notwithstanding anything herein to the contrary, the party claiming to be aggrieved may begin his proceeding hereunder by libel and seizure of the vessel or other property of the other party according to the usual course of admiralty proceedings, and the court shall then have jurisdiction to direct the parties to proceed with the arbitration and shall retain jurisdiction to enter its decree upon the award. July 30, 1947, c. 392, § 1, 61 Stat. 669.

§ 9. Award of arbitrators; confirmation; jurisdiction; procedure

If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title. If no court is specified in the agreement of the parties, then such application may be made to the United States court in and for the district within which such award was made. Notice of the application shall be served upon the adverse party, and thereupon the court shall have jurisdiction of such party as though he had appeared generally in the proceeding. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law of service of notice of motion in an action in the same court. If the adverse party shall be a nonresident, then the notice of the application shall be served by the marshal of any district within which the adverse party

may be found in like manner as other process of the court. July 30, 1947, c. 392, § 1, 61 Stat. 669.

§ 10. Same; vacation; grounds; rehearing

In either of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—

(a) Where the award was procured by corruption, fraud, or undue means.

(b) Where there was evident partiality or corruption in the arbitrators, or either of them.

(c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon suffiicient cause shown, or in refusing to hear evidence pertinent and material to the controversy or of any other misbehavior by which the rights of any party have been prejudiced.

(d) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(e) Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may in its discretion, direct a rehearing by the arbitrators. July 30, 1947, c. 392, § 1, 61 Stat. 669.

§ 11. Same; modification or correction; grounds; order

In either of the following cases the United States court in and for the district wherein the award was made may make an order modifying or correcting the award upon the application of any party to the arbitration—

(a) Where there was an evident material miscalculation of figures or an evident material mistake in

the description of any person, thing, or property referred to in the award.

(b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.

(c) Where the award is imperfect in manner of form not affecting the merits of the controversy.

The order may modify and correct the award, so as to affect the intent thereof and promote justice between the parties. July 30, 1947, c. 392, § 1, 61 Stat. 669.

§ 12. Notice of motions to vacate or modify; service; stay of proceedings

Notice of a motion to vacate, modify, or correct an award must be served upon the adverse party or his attorney within three months after the award is filed or delivered. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a nonresident then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court. For the purposes of the motion any judge who might make an order to stay the proceedings in an action brought in the same court may make an order, to be served with the notice of motion, staying the proceedings of the adverse party to enforce the award. July 30, 1947, c. 392, § 1, 61 Stat. 669.

§ 13. Papers filed with order on motions; judgment; docketing; force and effect; enforcement

The party moving for an order confirming, modifying, or correcting an award shall, at the time such

order is filed with the clerk for the entry of judgment thereon, also file the following papers with the clerk:

(a) The agreement; the selection or appointment, if any, of an additional arbitrator or umpire; and each written extension of the time, if any, within which to make the award.

(b) The award.

(c) Each notice, affidavit, or other paper used upon an application to confirm, modify, or correct the award, and a copy of each order of the court upon such an application.

The judgment shall be docketed as if it was rendered in an action.

The judgment so entered shall have the same force and effect, in all respects, as, and be subject to all the provisions of law relating to, a judgment in an action; and it may be enforced as if it had been rendered in an action in the court in which it is entered. July 30, 1947, c. 392, § 1, 61 Stat. 669.

§ 14. Contracts not affected

This title shall not apply to contracts made prior to January 1, 1926. July 30, 1947, c. 392, § 1, 61 Stat. 669.

SEP 2[illegible] 1953
HAROLD B. WILLEY, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1953.

No. 299.

KENTUCKY RIVER MILLS,
Petitioner,

vs.

G. HARRY JACKSON,
Respondent.

BRIEF

In Opposition to the Petition for a Writ of Certiorari.

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TABLE OF CONTENTS.

	Page
Statement	1
Argument	4

Cases Cited.

American Eagle Fire Insurance Company v. New Jersey Insurance Company, 240 N. Y. 398, 148 N. E. 562	4
Bankers & Shippers Insurance Company of New York v. Liverpool Marine and General Insurance Company, Ltd., English Court of Appeals, reported in New York Law Journal of March 4, 1925	5-6
Bullard v. Morgan H. Grace Company, Inc., 240 N. Y. 388, 148 N. E. 559	4, 6
Cantey v. McLain Line, Inc., 40 Fed. Supplement 887	10
Carpenter v. Mary R. Mullens, 33 Fed. Supp. 10	10
Finsilver, Still & Moss v. Goldberg, Maas & Company, 253 N. Y. 382, 171 N. E. 579	5, 7
Hackney v. Adams, 127 N. W. 519 (N. D.)	9
Hamilton v. Home Insurance Co., 137 U. S. 370, 11 Supreme Court 133, 34 L. Ed. 708	8
In re: Petition of Pahlberg, 43 Fed. Supplement 761	8
International Brotherhood of Teamsters, etc., v. Shapiro, 138 Conn. 57, 82 Atl. (2d) 345	6, 7
Kent v. French, 76 Iowa 187, 40 N. W. 713	8
Knutson v. Lasher, 18 N. W. (2d) 688 (Minn.)	6
Lehigh Structural Steel Company v. Rust Engineering Company, 59 Fed. (2d) 1038	9

Liverpool Marine and General Insurance Company, Ltd., v. Bankers & Shippers Insurance Company of New York, 24 Ll. L. Rep. 85, H. L. 6

Marchant v. Meade-Morrison Mfg. Co., 226 Appellate Division, 397, 235 N. Y. Supplement 370 8

Moran Towing & Transfer Company v. U. S., 80 Fed. Supplement 623 10

Murray Oil Products Company v. Mitsui & Company, 145 Fed. (2d) 381 9

The Chickie, 141 Fed. (2d) 80 10

The Gerald A. Fagan, 49 Fed. (2d) 215 9

United Fuel Gas Company v. Columbian Fuel Corporation, 165 Fed. (2d) 746 9

Statutes Cited.

46 U. S. C. A., Sec. 183 9

United States Arbitration Act:

Section 4 .....3, 4, 5, 6

Section 5 7

Section 9 .....8, 9, 10

Textbook Cited.

Sturgis on Commercial Arbitration and Awards, 448.. 4

IN THE

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No. 299.

KENTUCKY RIVER MILLS,
Petitioner,

vs.

G. HARRY JACKSON,
Respondent.

BRIEF

In Opposition to the Petition for a Writ of Certiorari.

STATEMENT.

Petitioner and respondent's assignor, in April, 1944, entered into a contract for the sale and purchase of fibre (R. 168).

The contract provided for the settlement of disputes arising thereunder by arbitration in New York in the customary manner. Provision was made for the selection

of an arbitrator by each party. It was further provided that if either party failed to name an arbitrator, the one arbitrator nominated might act as sole arbitrator (R. 170).

The fibre covered by the contract was shipped by respondent's assignor to petitioner from New York to Kentucky and petitioner declined to receive or pay for it (R. 182).

Upon the failure of petitioner to accept or pay for the fibre, respondent's assignor, on November 24, 1944, demanded arbitration in accordance with the contract (R. 4), and notified petitioner of its appointment of an arbitrator.

Upon receiving notice from respondent's assignor of the appointment of an arbitrator, petitioner wrote respondent's assignor (R. 90) stating that it had canceled the contract; that the fibre was not as represented by sample; that the shipment was not made in a reasonable time; and that it, therefore, declined to recognize the validity of the contract.

Thereafter, on December 11, 1944, the arbitrator appointed by respondent's assignor served notice on both parties to the contract that he would hold a hearing on December 19, 1944, at the place set out in the notice, and the notice was duly served on both parties (R. 5). Hearing was held and an arbitration award made in favor of respondent's assignor (R. 11). The petitioner did not appear at the hearing; did not offer any objection to the jurisdiction of the arbitrator; and did not offer any evidence.

On February 16, 1949, the instant action at law on the award was filed in the District Court of the United States for the Eastern District of Kentucky.

The petitioner contends that upon its failure and refusal to participate in the arbitration proceedings, the sole remedy of the respondent's assignor was to obtain an enforce-

ment order under Section 4 of the United States Arbitration Act (hereinafter sometimes called the Act). The petitioner further contends that an action at law could not be maintained on the award after one year from the rendition of the award. On page 2 of its petition for a writ of certiorari, petitioner sets out the questions presented. We believe that the questions presented are more accurately stated as follows:

> 1. Where a contract involving interstate commerce provides for arbitration in New York in the customary manner and further provides that if one party shall fail to nominate an arbitrator, the arbitration shall proceed before the single arbitrator appointed by the other, if one of the parties fails to appoint an arbitrator upon the ground that the contract was breached by the other, may the party desiring to proceed with the arbitration do so in the manner specifically provided in the contract and in the customary manner under the laws of New York without obtaining an enforcement order under Section 4 of the United States Arbitration Act?
>
> 2. May a valid award obtained in arbitration proceedings pursuant to an agreement to arbitrate contained in a contract involving interstate commerce be enforced by an action at law commenced more than one year after the award is made?

We believe that the statement of facts hereinabove set out are sufficient for a decision of the questions raised, and that the statement of facts contained in petitioner's brief is not only somewhat incomplete but also contains certain recitals of fact not material to the decision of the questions presented in the petition.

ARGUMENT.

The petitioner undertakes to obscure the true issue by the manner in which it states the first question presented on page 5 of the petition. As stated by the petitioner, it is whether a party upon the refusal of the other party to arbitrate on the ground that the contract is invalid and unenforceable may proceed with the arbitration in the manner provided in the contract and secure judicial enforcement of the award thereby obtained rather than evoke the remedy provided in Section 4 of the Act. From our statement of the facts involved, it will be seen that the real question is whether an award is valid when the arbitration proceedings were as provided in the contract although one party failed to appoint an arbitrator because of its claim that the contract had been breached by the other party (the very question to be arbitrated) and no enforcement order under Section 4 of the Act was obtained.

The petitioner relies on Bullard v. Morgan H. Grace Company, Inc., 240 N. Y. 388, 148 N. E. 559. This case held that under the New York Arbitration Act, as it then existed, where one of the parties challenged the jurisdiction of the arbitrators at the arbitration proceedings an award could not be rendered until the jurisdiction of the arbitration tribunal had been determined in an enforcement proceeding as provided in the New York Act. It does not, however, appear that it was the purpose of the court in the Bullard case to announce that enforcement proceedings were a prerequisite to all ex parte statutory arbitrations. See an extended discussion of the Bullard case in Sturgis on Commercial Arbitration and Awards, 448, and compare American Eagle Fire Insurance Company v. New Jersey Insurance Company, 240 N. Y. 398, 148 N. E. 562.

The importance of this consideration is evident when we recall that the only objection the petitioner made to

participating in the arbitration was by way of a letter to respondent's assignor claiming a breach of the contract, and no appearance or objection was ever made before the arbitral tribunal which had been appointed in accordance with the provisions of the contract.

Petitioner argues, however, that the Bullard case stands for the proposition that all ex parte statutory arbitrations are outlawed and that such result is required by the internal framework of the U. S. Arbitration Act, and further that such construction is necessitated by the constitutional requirement of due process.

Of course, the Bullard case is not binding upon this court and whether it will be followed depends on whether or not the principles laid down therein seem to this court to be sound. Other cases hold contrary to the Bullard case and we will undertake to demonstrate their soundness as contrasted with this New York opinion.

Not only this, but the New York Legislature likewise recognized the unsoundness of the Bullard opinion as demonstrated by an amendment to the New York Arbitration Act, which was designed to cure the mischiefs created by this decision. In 1927 the New York Legislature amended the New York Arbitration Act so as to provide for ex parte arbitration and giving the objecting party the right to raise the defense of the lack of the existence of an arbitration contract at any stage of the proceedings. This amendment was considered by the New York court in the case of Finsilver, Still & Moss v. Goldberg, Maas & Company, 253 N. Y. 382, 171 N. E. 579. In discussing the amendment the New York court said that what was sought to be done was to give validity to the practice which, in the opinion of the English judges, or most of them, was permissible already without the aid of an amendment. See Bankers & Shippers Insurance Company of New York v. Liverpool Marine and General Insurance Company, Ltd., English

Court of Appeals, reported in New York Law Journal of March 4, 1925, reversed on the authority of Bullard v. Morgan H. Grace Company, Inc., supra, Liverpool Marine and General Insurance Company, Ltd., v. Bankers & Shippers Insurance Company of New York, 24 Ll. L. Rep. 85, H. L.

The contention is made in the instant case that the failure of Congress to amend the U. S. Arbitration Act along the lines of the 1927 amendment to the New York Arbitration Act was an indication of the unwillingness of Congress to do so. It rather seems to us, in the light of the judicial discussion, that the indication rather is that there was no necessity to do so.

Connecticut has reached a result exactly contrary to the result reached by the New York Court in the Bullard case. International Brotherhood of Teamsters, etc., v. Shapiro, 138 Conn. 57, 82 Atl. (2d) 345. And see also Knutson v. Lasher, 18 N. W. (2d) 688 (Minn.).

Insofar as the statute itself is concerned, Section 4 of the Act does not require the result for which the petitioner contends. Section 4 of the Act refers to the party aggrieved and provides that he **may** take certain action. As pointed out in the Shapiro case, occasions may arise when application to the court must be made if the arbitration is to proceed, as, for example, where it is necessary to compel the unwilling party to perform an essential affirmative act, such as to name an arbitrator. However, in the instant case the contract provided for the method of creating the arbitral tribunal without the concurrence of the party in default. Here the respondent's assignor was not aggrieved by the failure of the petitioner to name its arbitrator since the arbitral tribunal could be properly constituted as provided in the contract. If the petitioner did not desire to appear before the tribunal, either to object to its jurisdiction or to introduce evidence, it did so at its peril. The respondent's assignor was not aggrieved.

All of the sections of the U. S. Arbitration Act must be construed together. It will be noted that Section 5 of the Act provides that if in the agreement provision be made for the method of naming an arbitrator or arbitrators, that method must be followed. Nothing in the Act prevents a proceeding before a single arbitrator appointed as provided in the contract.

We readily concur with petitioner's position that it is entitled to its day in court to obtain a determination as to whether or not a contract actually existed between it and respondent's assignor. We do not, however, agree with its contention that the U. S. Arbitration Act must be construed to mean that such determination can only be made at the time and in the manner provided in Section 4 of the Act. This determination can be made, so far as anything in the Act appears, at any time the court is called upon to give legal consequence to the award. International Brotherhood, etc., v. Shapiro, supra, and Finsilver, Still and Moss v. Goldberg, Maas & Company, supra. As long as the petitioner has the right to challenge the non-existence of the contract at any stage where the arbitration award is relied on as a source of rights and duties, no due process question exists. It is this precise point that was decided in the Finsilver case.

The petitioner, however, says that it could not participate in the arbitration without waiving its right to thereafter challenge its validity. It then contends that its right to challenge the existence or non-existence of the contract was so circumscribed as to raise a constitutional question. This is not correct. Its participation in the arbitration after questioning the jurisdiction of the arbitrators at the arbitration hearing would not thereafter estop it from relying upon the invalidity of the contract. This was so held in the Finsilver case. The same result has been reached without the benefit of a statute such as

is found in the 1927 amendment to the New York Act. Kent v. French, 76 Iowa 187, 40 N. W. 713; Marchant v. Meade-Morrison Mfg. Co., 226 Appellate Division, 397, 235 N. Y. Supplement 370.

The second question raised by the petitioner is whether the one year limitation period mentioned in Section 9 of the U. S. Arbitration Act was a bar to the maintenance of the instant action. It will be noted that Section 9 of the Act provides a summary method for enforcing the award. In the court below the petitioner argued that an action at law on the award could not be maintained since Section 9 provided the exclusive remedy for its enforcement. It also contended there, as it contends here, that the limitation period for the summary remedy created by Section 9 of the Act applies to an action of law on the award. The real question is whether or not Section 9 of the Act is an exclusive remedy for the enforcement of a valid award. If it is not an exclusive remedy then an action at law may be brought upon the award and the limitation period for the summary remedy established in Section 9 of the Act does not apply.

Petitioner's proposition is simply this—that the U. S. Arbitration Act created a right which was unknown at common law; that where the statute creating the right also provides the remedy, the remedy so provided is exclusive; and that, therefore, this action was not timely brought. At common law it was never denied that an agreement to arbitrate created a right, but public policy was thought to forbid specific performance. In re: Petition of Pahlberg, 43 Fed. Supplement 761; Hamilton v. Home Insurance Co., 137 U. S. 370, 11 Supreme Court 133, 34 L. Ed. 708. The remedial provisions setting up the summary proceedings in Section 9 of the Act were intended as an addition or supplement to the already existing powers of the Federal Courts to extend relief ir-

respective of the statute. The Gerald A. Fagan, 49 Fed. (2d) 215; Murray Oil Products Company v. Mitsui & Company, 145 Fed. (2d) 381. That Section 9 of the Federal Arbitration Act does not furnish an exclusive remedy has been heretofore decided. Murray Oil Products Company v. Mitsui & Company, supra; Lehigh Structural Steel Company v. Rust Engineering Company, 59 Fed. (2d) 1038.

That the summary remedy for the enforcement of an award provided for in Arbitration Acts—such as Section 9 of the United States Arbitration Act—is cumulative and not exclusive, even in case the arbitration agreement provides for entry of a judgment on the award, is squarely decided by United Fuel Gas Company v. Columbian Fuel Corporation, 165 Fed. (2d) 746, in an extended opinion by Judge Parker, which may be read with interest and assistance.

We also cite the case of Hackney v. Adams, 127 N. W. 519 (N. D.), where the exact question here under discussion was considered and decided. In that case an action at law was brought on an award after the lapse of the limitation period for summary proceedings and it was held that while the time for making application upon motion, for an order confirming the award and entering a judgment thereon had elapsed, an action at law upon the award could be maintained and judgment thereon obtained.

The very language of the statute itself indicates that Section 9 of the Act was not intended to furnish an exclusive remedy. The statute itself specifically says that a party to the arbitration **may** apply to the court for an order confirming the award.

An analogous situation arises under 46 U. S. C. A., Sec. 183, in Admiralty, relating to the right of limitation of liability given to the owner of a vessel. In this connec-

tion see The Chickie, 141 Fed. (2d) 80; Moran Towing & Transfer Company v. U. S., 80 Fed. Supplement 623; Cantey v. McLain Line, Inc., 40 Fed. Supplement 887; Carpenter v. Mary R. Mullens, 33 Fed. Supp. 10.

We believe that we have demonstrated, therefore, the summary remedy provided in Section 9 of the U. S. Arbitration Act is not the exclusive remedy for the enforcement of an award and that an action at law may be brought thereon. The limitation period of Section 9 of the Act is clearly a limitation on the summary remedy therein provided and we must look elsewhere to find the applicable limitation period for an action at law on the award. Therefore, the action was timely brought.

We submit that the opinion of the United States Court of Appeals for the Sixth Circuit in this case is so logical and sound that there is no occasion for the granting of the petition for a writ of certiorari as there exists no conflict between the United States Circuit Courts upon the questions herein involved. The well reasoned opinion of the Court of Appeals for the Sixth Circuit is, in itself, an adequate response to the petition for a writ of certiorari.

We respectfully ask, therefore, that the petition for a writ of certiorari be denied.

Respectfully submitted,

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